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No. 88-1675

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JUDITH MORAN, *Petitioner*,

v.

CHARLES F. PERRY, *et al.*, *Respondents*.

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

I. RESPONDENTS MISCHARACTERIZE THE FACTS AND PROCEEDINGS BELOW

Respondents' "Restatement of Facts" presents a biased version of the events in this case. Petitioner has never been afforded the opportunity to prove or even argue her version of the employment relations underlying this case. Furthermore, in important respects the response makes assertions that are not supported by the record.

Respondents characterize "the focus of the trial" as "the enforceability of the covenant not to compete." Resp., at 3. While this is true, it neglects that the trial ended at the close of the plaintiffs' (respondents') case. The evidence at the trial consisted entirely of witnesses called by respondents and documents introduced by respondents. If the trial judge had not dismissed the

action at the close of plaintiffs' case, petitioner would have been entitled to defend on a theory that was unrelated to the issues concerning the covenant. That is, she intended to prove that the contract was unenforceable due to respondents' violations of express and implied terms in the agreement, which caused her to resign her position.

Respondents also give a completely unfounded description of the defenses petitioner was foreclosed from proving. Respondents allege: "The evidence that petitioner sought to have considered by the trial court on remand was evidence going to the reasonableness of the covenant not to compete, which evidence the Washington State Supreme Court held was irrelevant as a matter of state law." Resp., at 13. The lack of citation for this statement is instructive; it has no support in the record. Indeed, the

Washington Supreme Court failed to address the specific defense at issue here.

The manner in which respondents presented their version of the case to this Court illustrates petitioner's constitutional objection to the proceedings in the Washington Supreme Court. As the Court has stated:

> Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides . . . ."

Fuentes v. Shevin, 407 U.S. 67, 83 (1972).

II. THE FEDERAL QUESTION WAS PRESENTED BELOW

Respondents complain that petitioner is attempting "to create a federal constitutional issue where none was ever contemplated or decided." Resp., at 7. To be sure, until the Washington Supreme

Court made its initial decision in this case, no party could have anticipated that the litigation would involve a constitutional issue. As the Petition points out, under established Washington law, petitioner assumed that even if she lost the appeal to the state Supreme Court, the case would be remanded to give her an opportunity to put on affirmative defenses. Petn., at 21-22. It was the action of the Washington Supreme Court that denied petitioner due process of law.

Respondents also object that the due process violation was not distinctly labeled as a federal constitutional issue. They cite as authority cases that have a minimum age of 75 years. Recent cases indicate that this Court has "not insisted on such inflexible specificity." Webb v. Webb, 451 U.S. 493, 501 (1981). "No particular form of words or phrases

is essential," Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); jurisdiction "is not barred by failure to cite below the proper constitutional provisions when the lower courts consider the relevant provisions." Dyke v. Taylor Implement Manufacturing Co., Inc., 391 U.S. 216, 217-18 n.3 (1968). See also Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 159 n.5 (1980).

Here there can be no doubt that the Washington Supreme Court understood that petitioner was advancing a federal due process claim. Three members of the court below dissented on the federal ground urged by petitioner; the first paragraph of the dissent specifically cites the due process clause of the U.S. Constitution. See Petn., at 60a.

The critical point is that the underlying purposes for the final judgment rule have been served. The

state court has been "permit[ted] to exercise its authority, . . . to construe state statutes so as to avoid or obviate federal constitutional challenges. . . ." Webb v. Webb, 451 U.S. at 500. In short, "[t]he principal of comity that stands behind the 'properly-raised-federal question' doctrine," id., has been satisfied.

If this Court believes that the Washington Supreme Court should be given an additional opportunity to respond to petitioner's constitutional challenge, it still would be inappropriate to deny the writ of certiorari. In the face of the serious due process concerns raised in the Petition, the appropriate course would be to summarily reverse with instructions to reconsider the question.

III. JURISDICTION IS NOT DEFEATED BY THE FINAL JUDGMENT RULE

Respondents argue that there is no final judgment to review inasmuch as the Washington Supreme Court remanded the case for a trial on damages. Again they rely on old authority, Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948), that cannot be taken literally if considered in light of subsequent cases. There are a number of prominent recent cases in which the lower court's action was considered sufficiently final despite the fact that the state court had remanded for a trial on damages. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 n.42 (1982); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 480 (1975).

Cox Broadcasting lists several categories in which finality is found notwithstanding that "there are further

proceedings in the lower state courts to come." Id. at 477. These situations share common features:

> [A]dditional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.'

Id. at 477-78, quoting Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

In this case, the proceedings are "for all practical purposes concluded." 420 U.S. at 479. The remaining issues are controlled by state law; they involve determining the amounts owed by petitioner under the terms of the contractual covenant. This will be essentially an accounting for profits, the very type of remaining procedure that this Court has held not to bar a final judgment. See, e.g., Radio Station WOW,

Inc. v. Johnson, 326 U.S. at 124-27. In fact, the case relied upon by respondents, Republic Natural Gas, found there was no finality in view of the high probability that additional constitutional issues would be generated in the course of the remand. See Republic Natural Gas Co. v. Oklahoma, 334 U.S. at 72. By contrast, the Court pointed out that "[i]n accounting cases, that which still remains to be litigated can scarcely give rise to new federal questions." Id. at 71.

Another category mentioned by Cox Broadcasting involves those cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. The determination of damages in this case will not resolve the federal due process

issue. Instead, it will obligate petitioner to bear the expense of a futile appeal to a court that has already rebuffed her plea. Moreover, a decision by the trial court favorable to petitioner on her affirmative defense of contract breach could completely avoid a trial on damages. The trial on remand will not have a jury, and the trial judge could adjudicate petitioner's defenses prior to taking proof on damages. In short, to find lack of finality would produce "inexcusable delay . . . [and] result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." Id. at 479, quoting Mills v. Alabama, 384 U.S. 214, 217-218 (1966).

Finally, there is a category of cases not delineated in Cox Broadcasting, "where the subsequent state proceedings

would themselves deny the federal right for the vindication of which review is sought in the Supreme Court." R. STEARN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE 131 (6th ed. 1986). Given that the Washington Supreme Court has held the covenant to be valid and enforceable, it follows as a matter of course that on remand damages will be imposed on petitioner -- the only issue is the amount. Even an appeal beyond the trial court would require petitioner to post a substantial supersedeas bond to stay collection, see Wash. R. App. P. 8.1(b); Ryan v. Plath, 18 Wn.2d 839, 855-56, 140 P.2d 968, 976 (1943). The fact that petitioner would be exposed to coercive remedies unless she posted a bond would in these circumstances violate her due process rights. See North Georgia Finishing, Inc. v. Di-Chem, Inc., 419

U.S. 601, 607 (1975); Fuentes v. Shevin, 407 U.S. 67, 84-86 (1972).

Petitioner emphasizes that this case does not follow the pattern of decisions such as Republic Natural Gas, in which a state supreme court has ruled on liability and remands for a determination of damages. Rather, the Washington Supreme Court has by its own action precluded petitioner from fairly defending the liability issues.

Respectfully submitted,

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